

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matters of
 Southwestern Bell Telephone Company
 Tariff F.C.C. No. 73

) CC Docket No. 97-158
)
) Transmittal No. 2633

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

OPPOSITION TO DIRECT CASE

KMC Telecom, Inc. ("KMC"), by its undersigned counsel, hereby submits its opposition to the *Direct Case* filed by Southwestern Bell Telephone Company ("SWBT") pursuant to the *Order Designating Issues for Investigation* ("*Designation Order*") released on July 14, 1997 in the above-captioned proceeding. KMC is a non-dominant provider of competitive access and competitive local exchange services in the United States.

I. INTRODUCTION

The Commission seeks comment on SWBT's Transmittal No. 2633 which proposes to add to SWBT's interstate access tariff a new Section 29, entitled Request for Proposal ("RFP"). This new Section includes SWBT's responses to customer RFPs submitted to it in "competitive bid situations." SWBT seeks permission to offer access services to AT&T Corp. ("AT&T") and Coastal Telephone Company ("Coastal") at rates below its otherwise tariffed rates for those same "like" services. KMC opposes SWBT's Transmittal No. 2633 because it violates Section 202(a) of the Communications Act, as amended ("Act") and does not fall within any Commission adopted exception. Application of the competitive necessity doctrine to SWBT's Transmittal No. 2633 is not warranted at this time and, even if the Commission were to apply the doctrine, Transmittal No. 2633 fails to meet the criteria. KMC respectfully urges the Commission to reject SWBT's Transmittal No. 2633 in this proceeding.

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II. TRANSMITTAL NO. 2633 VIOLATES THE COMMISSION'S POLICY PROHIBITING DOMINANT LECs FROM OFFERING CONTRACT TARIFFS

The *Designation Order* requests comment on whether “Transmittal No. 2633, as a tariff initiated by a LEC to respond to a competitor’s offer to an end user, would appear to meet the Commission’s definition of an RFP tariff that is prohibited under the Commission’s current policy.”^{1/} SWBT’s Transmittal No. 2633 is a RFP tariff under the Commission’s definition. Dominant carriers, such as SWBT, are prohibited from offering RFP tariffs, therefore, Transmittal No. 2633 must be rejected by the Commission.^{2/}

SWBT attempts to argue that the Commission’s current policy does not prohibit dominant LECs from offering RFP tariffs or contract tariffs due to lack of a cited order by the Commission.^{3/} SWBT fails to recognize that the definition of a contract tariff includes only interexchange carriers (“IXCs”) and non-dominant carriers. In other words, *by definition*, a dominant carrier cannot offer a contract tariff. Section 61.3(m) of the Commission’s rules defines contract tariff as a “tariff based on a service contract entered into between an interexchange carrier . . . or a non-dominant carrier and a customer.”^{4/} The Commission confirms that “*by definition, a dominant LEC may not offer a contract tariff.*”^{5/}

^{1/} *Designation Order* at para. 18.

^{2/} In its Order, the Commission confirmed that its policy prohibits both contract and RFP tariff offerings by LECs. *Designation Order* at para 18.

^{3/} SWBT *Direct Case* at 3.

^{4/} 47 C.F.R. §61.3(m).

^{5/} *Designation Order* at para 17.

SWBT's claim that it did not file its RFP tariff as a contract tariff is without merit. Transmittal No. 2633 is clearly a contract tariff. Section 61.55 of the Commission rules defines what constitutes a contract tariff and SWBT's Transmittal No. 2633 meets that definition.^{6/} First, the SWBT Transmittal No. 2633 establishes a term of 36 months for the contract, including a renewal option to extend the service for two additional years.^{7/} Second, Transmittal No. 2633 includes a brief description of each of the services offered to AT&T and Coastal.^{8/} Third, Transmittal No. 2633 sets minimum volume commitments for each service.^{9/} Fourth, Transmittal No. 2633 contains the contract price for each service or services at the volume levels committed to by the customers. Fifth, a general description of the volume discounts is built into the contract rate structure. Finally, a general description of other classifications, practices and regulations affecting the contract rate are included. SWBT's tariff contains all the elements of a contract tariff. Furthermore, the very nature of a RFP -- responding to a individualized request for proposal -- demands a contract tariff in response. SWBT's "RFP" tariff is conclusively a contract tariff.

Furthermore, as noted by the Commission, a competitive response or RFP tariff is "a *contract tariff* that a LEC initiates when it responds to a competitor's offer to an end user, or in response to a request for proposal."^{10/} Transmittal No. 2633 is SWBT's response to AT&T and Coastal's RFPs. As a contract tariff, SWBT's Transmittal No. 2633 must be rejected by the Commission.

^{6/} 47 C.F.R. § 61.55.

^{7/} SWBT FCC Tariff No. 73, at Original Page 29-5 and 29-6.

^{8/} *Id.* at 5th Revised Page 29-2, 6th Revised Page 29-4, and Original Page 29-6.

^{9/} *Id.* at 6th Revised Page 29-4 and Original Page 29-6.

^{10/} *Designation Order* at para 18.

III. TRANSMITTAL NO. 2633 VIOLATES THE DS-3 ICB ORDER'S RESTRICTION ON TARIFF OFFERINGS ON AN INDIVIDUAL CASE BASIS BY DOMINANT CARRIERS

The *Designation Order* seeks comment on whether Transmittal No. 2633 is an individual case basis ("ICB") tariff and whether such a finding would compel a rejection of the transmittal, assuming a rejection of SWBT's competitive necessity argument.^{11/}

Through its Transmittal No. 2633, SWBT attempts to provide ICB pricing to AT&T and Coastal in response to those carrier's RFPs submitted to SWBT. The Commission has defined ICB pricing as a term usually used "when a carrier adopts a practice of developing a price for a particular service or facility in response to each customer request for the service or facility."^{12/} SWBT's claim that it did not file its Transmittal No. 2633 as an ICB tariff is a play on semantics.^{13/} SWBT cannot deny that the *de facto* result of its transmittal is an ICB offering. As Sprint accurately points out, "because the rates are bundled for all the facilities required by the RFPs and because the rates are available only to customers 'requesting the same service in the same quantities at the same Central Office(s),' the proposed rates are clearly available only to the customers issuing the RFPs."^{14/} The rates proposed by SWBT in Transmittal No. 2633 are far below SWBT's otherwise-applicable tariffed rates. The discrepancy between the ICB rate and the averaged rate is unlawfully

^{11/} *Designation Order* at para. 22.

^{12/} *Local Exchange Carriers Individual Case Basis DS-3 Service Offerings*, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989)("DS-3 ICB Order").

^{13/} SWBT's *Direct Case* at 3.

^{14/} *Sprint Petition to Reject, or Alternatively Suspend and Investigate* at 2.

discriminatory and in violation of the Commission's *DS-3 ICB Order*. In the *DS-3 ICB Order*, the Commission found that the practice of offering the same access service at both ICB and averaged prices to be unreasonably discriminatory.^{15/} The Commission must reject Transmittal No. 2633.

IV. TRANSMITTAL NO. 2633 VIOLATES SECTION 69.3(e)(7) OF THE COMMISSION RULES REQUIRING DOMINANT LECs TO OFFER AVERAGED RATES THROUGHOUT THEIR INDIVIDUAL STUDY AREAS

The *Designation Order* seeks comment on whether Transmittal No. 2633 violates Sections 69.3(e)(7) or 69.123(c) of the Commission's rules.^{16/} SWBT attempts to argue that Transmittal No. 2633 meets the competitive necessity doctrine, an exception to Section 69.3(e)(7). As demonstrated below, this argument fails.

The Commission's rules require geographically averaged rates throughout a LEC's study area to prevent LECs from unreasonably discriminatory pricing.^{17/} Transmittal No. 2633 deviates from this general rule and fails to comply with any exception to the rule adopted by the Commission.^{18/} Therefore, SWBT's proposal to offer below averaged rates to AT&T and Coastal is in direct violation of Section 69.3(e)(7).

^{15/} *DS-3 ICB Order*.

^{16/} *Designation Order* at para. 23.

^{17/} 47 C.F.R. § 69.3(e)(7).

^{18/} The Commission has adopted narrow exceptions to this general rule which include ICB tariffs, contract tariffs and zone density pricing.

V. THE COMPETITIVE NECESSITY DOCTRINE DOES NOT APPLY TO SWBT

The *Designation Order* requests SWBT to explain why the competitive necessity doctrine should be available to dominant LECs as a defense to discrimination.^{19/} As demonstrated below, SWBT fails to provide a reason why the competitive necessity doctrine should apply to dominant LECs.

SWBT's arguments supporting application of the competitive necessity doctrine to dominant LECs are entirely unpersuasive.^{20/} SWBT attempts to argue that the Commission has no choice but to apply the competitive necessity doctrine to dominant LECs since the Commission refrained from finding that the doctrine did not apply in a previous decision. The Commission's decision to refrain from addressing an issue cannot be translated into a decision on the issue. This is a far reaching attempt by SWBT to force the Commission into a corner.

Application of the competitive necessity doctrine to dominant LECs is not warranted at this time. With a dominant carrier's ability to improperly exercise market power, the Commission should be cautious in allowing a dominant carrier into a less than competitive market, as it could upset the development of competition in that market. The Commission should also consider the impact that such improper exercises of market power could have in deterring CLECs and other potential entrants to the access service market. The Commission should require substantive proof of a strong competitive market prior to allowing a dominant LEC the use of the competitive

^{19/} *Designation Order* at para. 24.

^{20/} SWBT *Direct Case* at 5.

necessity defense. In light of these concerns, the Commission should refrain from making the competitive necessity doctrine available to dominant LECs.

The *Designation Order* further asks whether the competitive necessity defense should always be available to carriers. SWBT responds to this issue by relying on an assumption made by the Commission in a previous decision. SWBT argues that the Commission's decision to *assume* that the competitive necessity doctrine was available prevents the Commission from deciding otherwise now.^{21/} If SWBT's arguments were accepted, the Commission would no longer be in a position to make assumptions, to refrain from determinations, or to condition any interpretation without making a finding of some sort.

The *Designation Order* asserts that it is relevant and necessary to determine that the conditions experienced in today's access markets are similar to the conditions experienced by AT&T when it was granted competitive necessity. SWBT first argues that there is not reason to regulate the various pieces of the market differently.^{22/} This argument ignores the true regulatory environment in which carriers provide various telecommunications services. Each aspect of the telecommunications market is currently at a different level of competitive development. No two areas of the market are equally competitive right now. Each piece of the telecommunications market requires varying levels of regulation to prevent anticompetitive behavior, cross subsidization, and predatory pricing. The access service market, which is still in a competitive developmental stage, still requires a level of regulation greater than that which the long distance market receives.

^{21/} SWBT *Direct Case* at 6-7.

^{22/} SWBT *Direct Case* at 7.

SWBT further argues that “there are many providers of interexchange services, there are likewise many providers of access services.”^{23/} This statement is an obvious exaggeration. In its *Direct Case*, SWBT only produces two carrier tariffs to support its position that lower competitive prices exist and those tariffs fail to cover all the services SWBT intends to offer via its Transmittal No. 2633.

Even if the Commission found that the competitive necessity test applied to dominant LECs, SWBT fails to meet any of the criteria. The competitive necessity test, as set forth by the Commission in the *Private Guidelines Order* and as cited by the Commission in its *Designation Order*, states that “[a] carrier’s proof (of competitive necessity) should include a showing that (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users.”^{24/} This test has been upheld on appeal by the Second Circuit as consistent with the Interstate Commerce Commission’s determination that the competition must be “genuine and not a pretense.”^{25/}

The competitive necessity test is the standard for competition and SWBT has failed to meet it. With respect to the first criterion, SWBT cannot confirm with any certainty the existence of

^{23/} *Id.*

^{24/} *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C.2d 923, 948 (1984).

^{25/} *American Tel. and Tel. Co. v. Federal Communications Comm’n*, 449 F.2d 439, 450 (2nd Cir. 1971).

competition from other vendors in a given RFP. SWBT claims that “the issuance of one RFP should be sufficient to determine that competition exists for purposes of the competitive necessity test.”^{26/}

Such a benchmark would render the standard ineffectual and useless.

SWBT produces tariffs of two carriers to substantiate its claim that lower priced alternatives are available. As stated, these tariffs fail to prove that a competitive alternative exists for all services SWBT intends to offer in response to the RFPs. Furthermore, the production of only *two* carrier tariffs raises the question of the status of competition in the access service market.

With respect to the second and the third criteria, SWBT has done nothing to reveal that the terms of its discounted offerings are reasonably designed to meet competition without undue discrimination or that these discounts will contribute to reasonable rates and efficient services for all users. Specifically, SWBT fails to meet the second prong of the competitive necessity test which requires “the terms of the discounted offering [to be] reasonably designed to meet competition without undue discrimination.”^{27/} Transmittal No. 2633 is discriminatory on its face. The probability that another carrier would require an the same set of facilities is zero. In other words, the availability of the terms, conditions and prices that SWBT offers are only accessible to the individual customer submitting the requesting proposal. Other carriers will be precluded from the lower prices resulting in undue discrimination.

SWBT has failed to prove that its Transmittal No. 2633 meets the competitive necessity test. As a result, SWBT’s proposed tariff must be rejected.

^{26/} SWBT *Direct Case* at 11.

^{27/} *Private Line Guidelines Order* at 948.

VI. CONCLUSION

The rates set forth in Transmittal No. 2633 threaten the development of competition in the access service market. A stronger competitive market must exist prior to allowing a dominant LEC, such as SWBT, into the market. The Commission must continue to prevent SWBT's attempts to maintain its monopolistic control over the access market. KMC Telecom, Inc. respectfully urges the Commission to reject SWBT's Transmittal No. 2633.

Respectfully submitted,



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Dated: August 28, 1997

CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on the 28th day of August, 1997, the foregoing

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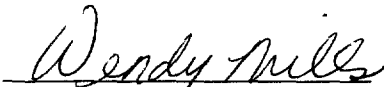
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